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IN THE

Supreme Court of the United States

RICHARD E. GLOSSIP, *et al.*,

Petitioners,

v.

KEVIN J. GROSS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL CATHOLIC REPORTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Catholic Reporter (the "NCR") was established in 1964 as an independent journalistic outlet for Catholics and others who struggle with the complex moral and societal issues of the day. The NCR's mission is to connect Catholics to church, faith, and the common good with independent news, analysis and spiritual reflection. It focuses on marrying the religious, political and social forces shaping public policies and institutions. It is a significant alternative Catholic voice that provides avenues for expression of diverse perspectives.

The NCR was the first newspaper of its kind, embracing the revolutionary idea that Catholics need access to news of the Church in order to be active participants and strong voices on important issues. Having developed through the inspiration of the Second Vatican Council, the NCR's spirit is independent, its management lay, and its vision ecumenical. The NCR publishes a biweekly print newspaper and has expanded its online reach to more than 4 million readers.

The NCR and its readership have a strong interest in the defense and promotion of human life and dignity. *See* Catechism of the Catholic Church ¶ 1930 (available at http://www.vatican.va/archive/ENG0015/_INDEX.HTM) (hereinafter Catechism). This interest is reflected in the

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1. Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

Catholic Church's decades-old opposition to the death penalty. More than thirty years ago, Catholic Bishops in the United States called for an end to the death penalty in the United States. They did so based on a conviction that "in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty." U.S. Bishops' Statement on Capital Punishment ¶ 9 (Nov. 1980) (available at http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/statement-on-capital-punishment.cfm); *see also* Statement of the Administrative Board, United States Catholic Conference, *A Good Friday Appeal to End the Death Penalty* (March 1999) (available at http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/good-friday-appeal.cfm).

Under the Church's teachings, the execution of another human being is justified only "in cases of absolute necessity"—that is, when "it would not be possible otherwise to defend society." Pope John Paul II, Evangelium Vitae (The Gospel of Life) ¶ 56 (available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html). "Today . . . as a result of steady improvements in the organization of the penal system, such cases are very rare if not practically non-existent." *Id.* "In January 1999, John Paul II applied this 'absolute necessity' rubric specifically to the United States and found that imposition of the death penalty in this country was 'both cruel and unnecessary.'" *See* Art C. Cody, *The King's Good Servants: Catholics as Participants in Capital Litigation*, 44 J. Catholic Legal Stud. 283, 285 (2005). Pope Francis recently noted, "[i]t is impossible to imagine that states today cannot make

use of another means than capital punishment to defend peoples' lives from an unjust aggressor." David Gibson & Josephine Mckenna, *Pope Francis blasts supermax prisons as 'torture'*, Washington Post, Oct. 23, 2014.

The issues in this case present serious concerns that underlie the Church's opposition to the death penalty. As demonstrated in Petitioner's Brief, the use of midazolam—a new and untested drug with respect to administration of the death penalty—in combination with a paralytic drug and potassium chloride, causes substantial physical and mental pain and suffering to the persons executed. Based on religious convictions, *amicus curiae* and its readership have an interest in ensuring that human beings are not subjected to the suffering that this method of execution entails. Indeed, in a jointly published editorial, the NCR and three other major Catholic publications—*America*, *National Catholic Register*, and *Our Sunday Visitor*—focused on the brutal nature of these executions to underscore the already existing need to abolish the death penalty in United States. *See* Editorial, *Catholic Publications Call for End to Capital Punishment*, March 5, 2015, http://ncronline.org/news/peace-justice/editorial-catholic-publications-call-end-capital-punishment.

SUMMARY OF ARGUMENT

Catholics believe that human beings are created in the image of God. A just and moral society treats human life with the utmost respect. Those Catholic teachings are consistent with this Court's precedent recognizing the sanctity of human life. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (noting that the death penalty is "the

most extreme sanction available to the State") (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); *see also Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that death is different.") (internal quotation marks omitted). In cases concerning the extinguishment of human life prior to natural death, the Court "has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

The use of midazolam as an anesthetic ahead of other drugs meant to paralyze and prematurely extinguish human life is inconsistent with Catholic teachings and this Court's precedent. The deliberate use of midazolam in executions despite scientific evidence that it is incapable of maintaining a deep coma-like unconsciousness, which is necessary to prevent the condemned from feeling substantial physical and mental pain prior to death, amounts to torture. Torture is prohibited by the Church and this Court. The Food and Drug Administration has not approved midazolam as a sole anesthetic, and its use in executions also amounts to impermissible experimentation. At core, the brutality associated with executions using midazolam fundamentally undermines the innate dignity of human life revered by so many Americans with religious convictions and embodied in our country's legal traditions.

Amicus curiae urges the Court to find that the use of midazolam during the execution process violates the Eighth Amendment's ban on cruel and unusual punishment.

ARGUMENT

I. *AMICUS CURIAE*'S VIEWS ARE RELEVANT IN INTERPRETING THE EIGHTH AMENDMENT

To determine whether a punishment is cruel and unusual under the Eighth Amendment, "courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*, 560 U.S. 48, 58 (2010) (internal citations and quotation marks omitted). The meaning of "cruel and unusual" is "not fastened to the obsolete"; rather, it "acquire[s] meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). In other words, a determination of what the Eighth Amendment bans as "cruel and unusual" depends on the moral sensibilities of modern society.

In applying the Eighth Amendment, this Court identifies society's moral sensibilities by looking to various indicators that "reflect the public attitude toward a given sanction." *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (citation omitted). These include actions of legislatures and jury sentencing records. *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion). But on matters involving a moral judgment—and, in particular, the death penalty—guidance from legislative bodies and juries is insufficient. *See Gregg*, 428 U.S. at 174 n.19 (plurality opinion) ("[L]egislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power"); *Lockhart v. McCree*, 476 U.S. 162, 173-74, 176 (1986) (acknowledging that determinations by

juries do not reflect a national consensus on moral issues such as the death penalty because persons opposed to the death penalty are required to be excluded from sentencing deliberations).

As a result, this Court often looks beyond legislatures and juries to determine what society sees as "cruel and unusual." For example, in interpreting the Eighth Amendment this Court has considered the views of professional organizations, the common law, the actions of prosecutors, commutation records, and the laws of other nations. *See Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (citing views of professional organizations); *Coker*, 433 U.S. at 592-93 (plurality opinion) (citing common law); *id.* at 592 n.4, 593, 596 n.10 (citing history and laws of other nations); *Enmund v. Florida*, 458 U.S. 782, 788-89, 796 n.22 (1982) (citing historical developments, commutation records and laws of other nations); *id.* at 796 (citing prosecutorial decisions to pursue the death penalty); *Trop v. Dulles*, 356 U.S. 86, 102 & n.35 (1958) (plurality opinion) (citing laws of other nations).

This Court has recognized that the death penalty and its implementation involve quintessentially moral questions. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.") (citation omitted). Indeed, determining a "standard of extreme cruelty . . . necessarily embodies a moral judgment." *Graham*, 560 U.S. at 58. The Eighth Amendment draws its meaning from "'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Trop*, 356 U.S. at 101 (plurality opinion)).

Institutions such as *amicus curiae* serve as moral guides for millions of Americans. The views of these institutions thus provide an important benchmark of the Nation's "evolving standards of decency." For this reason, this Court has considered the views of religious institutions in determining what punishments are abhorrent and thus "cruel and unusual" under the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing *amicus* brief of United States Catholic Conference and other religious organizations as "additional evidence" of a broad "social and professional consensus" against the execution of persons with mental retardation); *see also Stanford*, 492 U.S. at 388 n.4 (Brennan, J., dissenting, joined by Marshall, J., Blackmun, J., and Stevens, J.) (citing views of religious groups in considering the constitutionality of imposing the death penalty on a juvenile); *cf. Bowen v. Kendrick*, 487 U.S. 589, 606-07 (1988) (discussing the role of religious organizations in addressing secular problems in society).

From the Nation's founding, and especially during times of intense debate on moral issues, religious institutions have played a pivotal role in shaping the national conscience. The views of religious institutions, including *amicus curiae*, should be considered when evaluating the implementation of the most extreme penalty that can be imposed on a human being: the taking of a human life prior to natural death.

II. METHODS OF EXECUTION THAT ARE EXPERIMENTAL AND CAUSE UNDUE SUFFERING ARE AN AFFRONT TO HUMAN DIGNITY AND SHOULD NOT BE PERMITTED

A. Oklahoma's Use of Midazolam in Conjunction with a Paralytic and Potassium Chloride Creates a Substantial Risk of Torture

As discussed in Petitioner's Brief, the scientific community is in agreement that midazolam is pharmacologically incapable of maintaining the deep coma-like unconsciousness necessary to prevent the condemned from feeling substantial physical pain and suffering prior to death. *See generally* Pet. Br. at 13-17. The use of midazolam in executions creates a substantial risk that the condemned will suffer torturous pain or suffering prior to death. The Church's teachings prohibit torture in any form or method.

The Catechism of the Church identifies torture as a grave sin that violates the Fifth Commandment. *See* Catechism ¶¶ 2258-2330. Pope Francis has referred to torture as a "mortal sin" and has reiterated his "firm condemnation of all forms of torture." Charles Poladian, *Pope Francis Angelus Prayer: Torture A 'Very Grave Sin,' Calls For Its End In Sunday's Address*, Int'l Business Times, June 22, 2014. Pope John Paul II went so far as to call torture "intrinsically evil." 1993 Encyclical, Veritatis Splendor ¶ 80 (available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html). The Catechism recalls darker times, when "cruel practices were commonly used by legitimate governments to maintain

law and order, often without protest from the Pastors of the Church." Catechism ¶ 2298. Today, "it has become evident that these cruel practices were neither necessary for public order, nor in conformity with the legitimate rights of the human person." *Id.* Thus, "regulation against the use of torture, even in the case of serious crimes, must be strictly observed [by governments]." Compendium of the Social Doctrine of the Church ¶ 404 (available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html) (hereinafter Compendium). The Catechism provides that torture as punishment "is contrary to respect for the person and for human dignity." Catechism ¶ 2297. As the United States Conference of Catholic Bishops noted, "[t]orture destroys our human dignity in multiple ways." United States Conference of Catholic Bishops, Torture is an Intrinsic Evil: A Catholic Study Guide for a One-Session 9 (2012) (available at http://www.usccb.org/issues-and-action/human-life-and-dignity/torture/upload/torture-is-an-intrinsic-evil-study-guide1.pdf) (hereinafter Torture Study Guide); *see also* Compendium ¶ 404 ("[T]he dignity of man is as much debased in his torturer as in the torturer's victim.").

The Church's teachings on torture are consistent with this Court's precedent. More than a century ago, this Court stated that "[p]unishments are cruel when they involve torture or a lingering death . . . ." *In re Kemmler*, 136 U.S. 436, 447 (1890); *see also Baze v. Rees*, 553 U.S. 35, 49 (2008). More recently, this Court has held that the Eighth Amendment "prohibits the imposition of inherently barbaric punishments under all circumstances." *Graham*, 560 U.S. at 59 (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)). "Punishments of torture, for example, are forbidden." *Id.*

(internal quotation marks omitted) (citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)). The Eighth Amendment forbids "all other[] [punishments] in the same line of unnecessary cruelty." *Baze*, 553 U.S. at 48. Indeed, in upholding execution by lethal injection in *Baze*, this Court accepted that "failing a proper dose of [a barbiturate] to render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 53.

The method of execution that is challenged in this case presents a "constitutionally unacceptable" specter of "torture or lingering death" that this Court warned against in *Baze* and *Kemmler*. It is undisputed that recent executions employing midazolam resulted in "lingering deaths." On July 23, 2014, Arizona inmate Joseph Wood, for example, spent an agonizing *two hours* between the administration of midazolam and hydromorphone and his death. *See* Pet. Br. at 21; Fernanda Santos, *Executed Arizona Inmate Got 15 Times Standard Dose, Lawyers Say*, N.Y. Times, Aug. 2, 2014. On April 29, 2014, it took Oklahoma inmate Clayton Lockett 43 minutes to die after he was injected with midazolam. Lindsey Bever, *Botched Oklahoma Execution Reignites Death Penalty Debate*, The Washington Post, April 30, 2014. And, on January 16, 2014, Ohio prisoner Dennis McGuire's execution lasted 25 minutes after he was administered midazolam and hydromorphone. Max Ehrenfreund, *Dennis McGuire executed in Ohio with new combination of lethal drugs*, The Washington Post, Jan. 16, 2014.

These drawn-out deaths subjected the condemned to terror and excruciating pain—not merely as an accident or

due to improper administration, but rather, as an *inherent* consequence of the use of midazolam, sometimes along with hydromorphone. Midazolam is not a barbiturate and cannot produce the coma-like unconsciousness that is required under *Baze* prior to the administration of other drugs that paralyze the diaphragm, thereby stopping respiration, and induce cardiac arrest. Its use in conjunction with other drugs, therefore, entails a "constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from the injection of potassium chloride." *Baze*, 553 U.S. at 53.

Lethal injection that causes such lingering death and pain is at odds with the Church's teachings and with this Court's precedent.

B. The Experimental Use of Midazolam in Lethal Injection Procedures Violates the Physical and Psychological Integrity of Human Beings

The recent disruptions in the supply of standard execution drugs has caused Oklahoma to turn to untested drug mixtures featuring midazolam. *See* Pet. Br. at 8-9. Some other states that used midazolam or considered using it, however, have turned away from the drug. *See id.* at 31. Midazolam is not approved for use as a sole anesthetic. *See id.* at 3. It does not reliably cause continuous, deep coma-like unconsciousness throughout the execution process. *See id.* Its use in conjunction with a paralytic and potassium chloride amounts to impermissible experimentation on human beings, which is inconsistent with the Church's teachings.

The Church rejects experimentation on human beings as immoral. The Catechism states that "[e]xperimentation on human beings is not morally legitimate if it exposes the subject's life or physical and psychological integrity to disproportionate or avoidable risks." Catechism ¶ 2295. Moreover, experimentation on humans violates "the dignity of the person if it takes place without the informed consent of the subject or those who legitimately speak for him." *Id.*

The Court has also decried experimentation on human beings. *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 169 (1952) (finding that forcibly removing narcotics from a defendant's stomach—which he had swallowed when confronted by police—"offend[ed] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses") (quoting, *Malinski v. New York*, 324 U.S. 401, 417 (1945)); *United States v. Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring in part and dissenting in part) (calling experimentation on human beings without their consent "far beyond the bounds of human decency"); *id.* at 687 (Brennan, J., concurring in part and dissenting in part) (noting that "[t]he medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable"); *see also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 180-81 (2d Cir. 2009) ("[T]he fact that the prohibition on medical experimentation on humans without consent has been consciously embedded by Congress in our law and reaffirmed on numerous occasions by the FDA demonstrates that the United States government views the norm as the source of a binding legal obligation. . . .").

The use of an untested drug to administer the most severe punishment that can be imposed on a human being is an impermissible intrusion of bodily integrity that is contrary to the Church's teachings and this Court's precedent.

C. *The Brutality of Recent Problematic Executions Devalues Human Life and Erodes Our Sense of Innate Human Dignity*

Under the Church's teachings, the rights flowing from human dignity "are prior to society and must be recognized by it." Catechism ¶ 1930. This is because "[t]he dignity of the human person is rooted in his creation in the image and likeness of God." *Id.* ¶ 1700. The "defense and promotion" of the dignity of human person "have been entrusted to us by the Creator." *Id.* ¶ 1929. Upholding this duty "entails respect for the rights that flow from [a human's] dignity as a creature." *Id.* ¶ 1930. These rights "are the basis of the moral legitimacy of every authority: by flouting them, or refusing to recognize them in its positive legislation, a society undermines its own moral legitimacy." *Id.*

> An act of such violence pushes individuals and members within a society towards two different forms of dehumanization: savagery, when feelings of anger or fear overwhelm principles of ethics and human rights; and barbarism, when perceived needs for security and supremacy destroy feelings of faith, solidarity and compassion. In fact, torture compromises the human dignity of both the victim and the perpetrator, estranging the

> torturer from God, and debasing the integrity of the tortured. What is more, when members of a society allow violent, dehumanizing practices to occur within their social sphere, that society's collective integrity and social fabric are greatly eroded. When a government not only allows, but sponsors, degrading, dehumanizing acts of violence, it sets a dangerous precedent that undermines the respect for everyone's human dignity and human rights.

Torture Study Guide at 7. Pope Benedict XVI declared that public officials should avoid "means of punishment or correction that either undermine or debase the human dignity of prisoners." Address of Pope Benedict XVI to the Participants in the Twelfth World Congress of the International Commission of Catholic Prison Pastoral Care, Sept. 6, 2007 (available at http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/september/documents/hf_ben-xvi_spe_20070906_pastorale-carceraria.html).

These principles are consistent with this Court's Eighth Amendment jurisprudence. This Court has stated that the Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). Most recently, in striking down Florida's IQ cutoff rule for death penalty eligibility, this Court repeatedly highlighted "the Constitution's protection of human dignity." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014); *see also id.* at 1993 (noting that executing a mentally disabled individual "contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled

person *violates his or her inherent dignity as a human being*") (emphasis added); *id.* at 2001 (noting that the law at issue "contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world").

No matter what crimes the condemned have committed, their dignity as human beings should be respected. It offends the values of the Church, our society and the Eighth Amendment to allow unnecessary affronts to human dignity in carrying out punishment. The use of midazolam in combination with other drugs presents a substantial risk of severe physical pain and mental suffering, which undermines the dignity of the condemned, those carrying out the sentence, and all of society.

CONCLUSION

For the reasons discussed above, *amicus curiae* urges the Court to reverse the judgment below and to hold that the use of midazolam during the execution process violates the Eighth Amendment's ban on cruel and unusual punishments.

Dated: March 16, 2015

Respectfully submitted,

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